

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN MARIANA ISLANDS

MOHAMMED KAMAL HOSSAIN,) APPEAL NO. 08-17754
) D.C. No. 08-0016 - ARM
Plaintiff-Appellant,)
) Garapan, Saipan
vs.) Thursday, October 16, 2008
) 9:00 a.m.
COMMONWEALTH OF THE NORTHERN)
MARIANA ISLANDS, ET AL.,) **MOTION TO DISMISS**
)
Defendants-Appellees.)

**BEFORE THE HONORABLE ALEX R. MUNSON
CHIEF JUDGE, UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS**

APPEARANCES:

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SANAE N. SHMULL
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1 COURTROOM CLERK MS. MATSUNAGA: Please rise.

2 THE COURT: Good morning. Please be seated.

3 COURTROOM CLERK MS. MATSUNAGA: Your Honor, please,

4 this is Civil Action No 08-0016, *Mohammad Kamal Hossain v.*

5 *Commonwealth of the Northern Mariana Islands, et al.*, coming up

6 for a Motion to Dismiss hearing.

7 Will counsel please state your appearance?

8 MS. CRUZ: Jessica Cruz for the United States, and I

9 have with me Victor Lawrance who's an attorney with DOJ's

10 Office of Immigration Litigation and he's here from Washington,

11 D.C.

12 MR. LAWRENCE: Good morning, Your Honor.

13 THE COURT: Good morning.

14 MS. BUSENKELL: Kathleen Busenkell on behalf of the

15 Commonwealth.

16 MR. CALIMBAS: Omar Calimbas with Micronesian Legal

17 Services.

18 THE COURT: Good morning.

19 COURT REPORTER: Can you speak up, please.

20 MR. CALIMBAS: Omar Calimbas for the plaintiff.

21 THE COURT: Yeah, I have a tentative ruling on both of

22 these motions. The tentative ruling is to grant the motions.

23 I think that the case is *res judicata*.

24 The defendant was, or the plaintiff was aware of the

25 derivative actions as early as his Second Amended Complaint.

1 And after his Fifth Amended Complaint, even though that wasn't
2 in there, the settlement agreement agreed that he would waive,
3 for the consideration of \$25,000.00, any rights that he knew
4 of, didn't know of that may arise in the future that in any way
5 were connected with this case. And so rather than hearing from
6 the moving parties, I'd rather hear from the plaintiff, and
7 then I'll give the moving parties an opportunity. You can make
8 any record that you deem necessary.

9 MR. CALIMBAS: And you just wanted to hear on the
10 issue of *res judicata*?

11 THE COURT: Okay, why don't you come to the lectern?

12 MR. CALIMBAS: And you -- I just wanted to make sure
13 you wanted me to comment on the issue of *res judicata*?

14 THE COURT: I don't particularly want you to comment
15 on anything; however, I will give you an opportunity to make
16 any record that you think you need to make.

17 MR. CALIMBAS: Okay, thank you, Your Honor. With,
18 with respect to the issue of *res judicata*, I think one thing
19 that wasn't mentioned in the motions to dismiss, in any of the
20 replies, was the purpose behind that doctrine. And, basically,
21 it's to ensure that the party that sought to be precluded had a
22 full opportunity and fair opportunity to litigate in the
23 earlier case.

24 Now what was litigated in the earlier case and
25 was settled upon? I think we can make definitely two

1 different claims here with this case and the prior case.

2 In discerning what the conditions for *res judicata*,
3 one thing that's clear is that there has to be identity with
4 certain aspect of the matters. One of them, most particularly,
5 is with the cause of action.

6 The prior case, in the Fifth Amended Complaint, talks
7 of the rights of the plaintiff. A settlement agreement under
8 its terms discusses the rights of the plaintiff with respect to
9 his refilement protections, non-refilement protections, that
10 is.

11 If you look at the settlement agreement especially
12 with respect to paragraph 3, it discusses the terms that
13 obligate the Commonwealth, that it will not remove the
14 plaintiff unless the minimum protections under the
15 International Covenants are established in the system. It
16 talks about protecting the plaintiff from removal, the
17 plaintiffs. It talks about the proposed legislation and
18 stating that if there's any amendments to the, those
19 legislations after the settlement agreement, it would not apply
20 to the plaintiff if facing removal. It nowhere discusses any
21 issues regarding derivative asylum or derivative refugee
22 protection.

23 THE COURT: Well, what about the settlement
24 agreement? The settlement agreement contemplates that.

25 MR. CALIMBAS: The settlement agreement contemplates

1 it with respect to paragraph 12, but only to the extent of any
2 claims related to the consolidated action. Now that's subject
3 to interpretation. Any claims related to the consolidated
4 action, we would argue, is with respect to the plaintiff's
5 claims protection, not with respect to the claim of family
6 reunification, which in fact is a whole other right and other
7 cause of action that this, this matter is involving.

8 THE COURT: Well, in the Second Amended Complaint,
9 that was prayed for.

10 MR. CALIMBAS: Well, that was --

11 THE COURT: So the plaintiff had to know that he was
12 waiving any cause of action that could have been brought.

13 MR. CALIMBAS: Well, I think we have to turn to the
14 settlement agreement and, which doesn't discuss that issue in
15 particular. We have to, we have to make sure that *res judicata*
16 is applied properly. And just because a settlement agreement
17 extends to claims related to the consolidated action previously
18 doesn't necessarily mean it would extend *ad infinitum*.

19 The complaint that was before the court, the most
20 recent one in that consolidated action, the Fifth Amended
21 Complaint, talks about the plaintiff's history. It talks about
22 the violence that he was submitted to, the persecution in
23 Bangladesh, and that his family was submitted to, and the
24 threats involved there. That was, that was his story.

25 What we're dealing with now is a different cause

1 of action, a different set of facts. We're in a situation now
2 where he is wanting to exercise his right to family
3 association. We're dealing with a fundamental right that's
4 been recognized by the U.S. Supreme Court.

5 THE COURT: Well, let's talk about that for a moment.
6 His family has to be here in Saipan to get that. That's issue
7 number one. And issue number two, what is your position about
8 the United States? They, the Commonwealth has plenary
9 authority over Immigration here, at least, until the minimum of
10 next year and maybe beyond that.

11 MR. CALIMBAS: That's correct, but that doesn't allow
12 the U.S. Government to contravene the equal protection clause.
13 The Immigration and Nationality Act does not apply here for
14 now, but there are aspects of refugee protection under the,
15 under the Refugee Act of 1980 that do apply here.

16 For example, putting asylees aside, refugee protection
17 under federal law does not require presence in the U.S.
18 Refugee protection under INA, Section 207 --

19 THE COURT: Well, you just said that the Commonwealth
20 has plenary authority over Immigration, not the United States,
21 didn't you?

22 MR. CALIMBAS: That's correct. It has plenary
23 authority. But I would turn to a decision made by this court.
24 In fact, it was on a Motion to Dismiss in one of the earlier
25 related cases, *Jamil Ahmed*, *Jamil Ahmed* case, Civil Action

1 00-05.

2 COURT REPORTER: What's the number again?

3 MR. CALIMBAS: Civil Action No. 00-0005, in which this
4 court did discuss INA, Section 207, regarding refugee
5 protection and not asylum protection, and did comment in how
6 that would be, how it would have to apply to CNMI based
7 refugees, and that it would be absurd to have refugee
8 protection applied to any other refugee in the world except for
9 those in the CNMI.

10 THE COURT: Well, was that the holding of the case?

11 MR. CALIMBAS: No, that wasn't the holding, Your
12 Honor. That was -- but the idea here is if that's allowed, we
13 have, we have different treatment. We have a classification
14 issue that invokes Fourteenth Amendment issues, where you have
15 U.S. Government treating asylees and refugees differently in
16 the CNMI.

17 With respect to asylees, the U.S. Government basically
18 wipes its hand and said, "we're going to transfer that to the
19 CNMI Government." But with respect to refugees, it's argued
20 that refugees may be able to avail of the protections under
21 INA, Section 207.

22 Under INA, Section 207 and the statutes promulgated
23 under that provision, it provides for a derivative status for
24 family members, basically, spouses and children as defined
25 under the INA.

1 So here we have the U.S. Government potentially
2 accepting those applications for refugees status and allowing
3 for family reunification for those refugees anywhere in the
4 world, including the CNMI, yet, saying for people who are
5 applying for non-refilement protection in the CNMI will defer,
6 will basically be abandoned and deferred to the CNMI
7 Government, and tacitly allow for non-family reunification.
8 And here, we have a classification. We have a difference here,
9 a different treatment where asylees -- well, let me put it this
10 way -- where refugees applying for protection under the CNMI
11 law would be treated differently when they could easily apply
12 for refugee protection under Section 207 of the INA and get
13 family reunification. And that's where we see the U.S.
14 Government having a problem with its policy there.

15 Just to close up on the *res judicata* issue, I think
16 with settlement agreements, again, the settlement agreement has
17 to show an -- there still has to be the conditions regarding
18 the identity of the cause of action, identity of parties,
19 identity of the subject matter. I think what is evident is
20 that the cause of action is not identical in this situation.

21 We're dealing with a family reunification issue.
22 We're dealing with a fundamental right protected under the
23 Fourteenth Amendment that allows for a parent to raise his
24 family and make decisions on behalf of his children. And this
25 has been acknowledged by the U.S. Supreme Court; and, in fact,

1 the Ninth Circuit in a dissent has discussed that issue in the
2 context of removal proceedings, and how international,
3 customary international law has evolved to the point where it
4 does recognize family reunification as a fundamental right.
5 And that's reflected in the recommendations under the 1951
6 Convention. It is a provision in the international covenant on
7 civil and political rights. It's also in the convention on the
8 rights of a child.

9 THE COURT: Can that be waived?

10 MR. CALIMBAS: The U.S. Congress can waive a -- the
11 U.S. Congress can make --

12 THE COURT: I'm talking about the plaintiff. Can the
13 plaintiff waive that right to effect a settlement?

14 MR. CALIMBAS: I'd have to -- I could brief the court
15 on that matter. I, I --

16 THE COURT: Well, I don't need it. I mean, you have
17 fundamental rights that you can waive. Isn't that true?

18 MR. CALIMBAS: I, --

19 THE COURT: Miranda Rights.

20 MR. CALIMBAS: I couldn't answer. I --

21 THE COURT: All right.

22 MR. CALIMBAS: But my point is that in fact what we're
23 dealing here is with the different, with different rights and a
24 different cause of action. And *res judicata* should not
25 apply in that situation.

1 THE COURT: Would it apply if it said in the
2 settlement agreement, "And I waive any cause of action in the
3 future to bring my family to the CNMI."?

4 MR. CALIMBAS: I believe that would be a stronger
5 argument for saying that *res judicata* applies.

6 THE COURT: Well, what is the difference between that
7 and settling between all causes of action known at the time of
8 the settlement? Because we know that the attorney and the
9 plaintiff knew that that was an issue because they had
10 previously raised it in an earlier Second Amended Complaint.

11 MR. CALIMBAS: That's correct, and I think it's
12 significant that it's not, it wasn't raised in the most, in the
13 Fifth Amended Complaint. And it's not, it's not clear in the
14 settlement agreement.

15 What's clear is when you look at the paragraphs and
16 you look at the language of all of the paragraphs in the
17 settlement agreement, especially what I was referring to in
18 paragraph 3, it's talking about protections for the plaintiff
19 *per se*. It's talking about preventing removal of the
20 plaintiff. It's talking protections that the plaintiff would
21 receive and not in regard to family reunification.

22 THE COURT: I think you would have a much stronger
23 argument if the Second Amended Complaint didn't exist that had
24 the cause of action to bring his family here, because in the
25 settlement agreement he agrees that he is effecting the

1 settlement for all causes of action, known and unknown and a
2 whole bunch of other adjectives. But anyway, do you have
3 anything further?

4 MR. CALIMBAS: I wanted to make sure it's on the
5 record. I'm not sure it's spelled out in the plaintiff's
6 briefs. But just to point out that we believe the CNMI
7 Government definitely has an obligation under Section 102 of
8 the Covenant to conform to any U.S. treaties. And I've named
9 several that the U.S. has acceded to. And I believe those are
10 in the briefs. And those treaties in the treaty provisions
11 would reflect a right to family reunification, and basically a
12 parent's right and even the child's right to family life, and
13 that the CNMI Government by not having those family
14 reunification provisions in its non-refilement protection
15 system would be contravening the Covenant.

16 THE COURT: You may be right if we ever got there.
17 But it appears to the court that all of that's been waived in
18 the settlement agreement.

19 MR. CALIMBAS: Thank you, Your Honor.

20 THE COURT: Thank you.

21 Any counsel for the defense want to be heard, make any
22 record?

23 MS. CRUZ: Your Honor, --

24 THE COURT: Why don't you come up so that we can get
25 a good record?

1 MS. CRUZ: Your Honor, I will be addressing the issues
2 of *res judicata*, and Mr. Lawrance will be addressing any
3 remaining issues in our Motion to Dismiss.

4 The crux of the plaintiff's prior lawsuit was the fact
5 that he was look, he was seeking a process to apply for asylee
6 or refugee status and to avail himself with the benefits of
7 those, of the asylee and refugee status, namely, protection
8 against violence, protection against torture, and protection
9 for his family located outside the CNMI.

10 Now the Ninth Circuit when it's considering whether
11 the cause of action in a subsequent lawsuit is the same cause
12 of action in a previous lawsuit, it looks to whether there's
13 substantially the similar evidence, whether there's the same
14 infringement of rights, and whether it's the same nucleus of
15 operative facts.

16 Here, the plaintiff is relying on the same incidents
17 of violence against his family that he relied upon in his
18 previous lawsuit, which is also shown in the Fifth Amended
19 Complaint about lawsuit. He's also arguing for the same
20 process to seek protection for his family located outside the
21 CNMI.

22 The settlement agreement is clear on its face. The
23 plaintiff waived and released any rights that he had to claims
24 arising out of the transactions or occurrences of the previous
25 lawsuit. And clearly, as shown in the Fifth Amended Complaint,

1 protection for his family is something that he sought in his
2 previous lawsuit. And the Settlement Agreement, along with the
3 Order of Dismissal with Prejudice, which was stipulated to by
4 the plaintiff as well as the United States, operates to bar his
5 claims, as being barred under the Doctrine of *Res Judicata*.

6 And unless the court has any questions, I have nothing
7 further.

8 THE COURT: I don't. Anybody else?

9 MR. LAWRENCE: Good morning, Your Honor. Victor
10 Lawrence for the United States. Pleasure to be here from
11 Washington, D.C.

12 THE COURT: Good morning.

13 MR. LAWRENCE: I just want to say a few words with
14 respect to the equal protection argument raised by the
15 plaintiffs.

16 You know, they claim that as a refugee that they're
17 treated differently. But the reality is that Mr. Hossain was
18 granted protection from refilment under the CNMI laws. The
19 INA, the Immigration Nationality Act does not apply to the
20 CNMI. And, as Your Honor mentioned, the CNMI has plenary, and
21 as counsel agreed, the CNMI has plenary authority over
22 Immigration up until at least June 1st, 2009, or it may be
23 extended up to a 180 days.

24 So, accordingly, Mr. Hossain is not similarly situated
25 to refugees or asylees under the Immigration Nationality Act.

1 He's subject to a different set of, a different law, the law of
2 the CNMI. Therefore, no equal protection claim or due process
3 claim arises.

4 And that's really -- I'm not familiar with the DICTA
5 in the *Ahmed* opinion that plaintiff's counsel raised. But
6 plaintiff counsel did indicate that that was just DICTA and not
7 holding of the court.

8 And therefore, I really have nothing else to add to
9 this unless Your Honor has any questions.

10 THE COURT: I don't, Mr. Lawrance.

11 Ms. Busenkell, did you want to make any record?

12 MS. BUSENKELL: No, Your Honor. The Commonwealth
13 would rest on its motion.

14 THE COURT: I am going to adopt my tentative ruling.
15 And I will issue a written order denying or granting both of
16 the motions, and possibly might add other than the *res judicata*
17 issue. But I think that's primarily the reason why the court
18 is granting the motions.

19 There being nothing further to come before the court
20 at this time, we'll stand in recess.

21
22 (Court recessed at 9:25 a.m., Thursday, October 16, 2008.)
23
24
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1 COMMONWEALTH OF THE)
2 NORTHERN MARIANA ISLANDS) ss.
3 SAIPAN, MP)
4 _____)

5
6 I, SANAE N. SHMULL, Retired Official Court Reporter
7 for the United States District Court for the Northern Mariana
8 Islands, do hereby certify:

9 That the foregoing Motion to Dismiss transcript in
10 *Mohammed Kamal Hossain v. Commonwealth of the Northern Mariana*
11 *Islands, et al.*, Civil Case No. 08-0016, consisting of 14
12 pages, was taken down by me stenographically and with a backup
13 tape-recording device at the time and place indicated herein.

14 That the foregoing record is a true and correct record
15 of the proceedings transcribed by me to the best of my ability
16 at the request of plaintiff Mohammed Kamal Hossain for appeal
17 purposes.

18 I further certify that I am not interested in the
19 events of the action.

20 IN WITNESS WHEREOF, I have subscribed my name and
21 signature this 20th day of February, 2009.

22
23
24 /s/ Sanae N. Shmull
25 SANAE N. SHMULL
Retired Official Court Reporter